United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 74-1100 74-1100

United States Court of Appeals

For the Second Circuit

JOEL BREAKSTONE
PLAINTIFF-APPELLANT

B

v.

JOHNSON STATE COLLEGE, et al.
DEFENDANT-APPELLEES

P/S

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

QUESTIONS PRESENTED

1. Did the appellant's expulsion from a state college without prior written notice of charges, a formal hearing, the opportunity to confront and cross-examine witnesses, the right to keep a transcript of the proceedings and the right to counsel violate the due process clause of the Fourteenth Amendment where he was charged with the creation of an explosive device capable of causing serious injury to persons and property?

2. Is a college president immune from liability for nominal and consequential damages for expelling a student in violation of the due process clause of the Fourteenth Amendment where he is philosophically opposed to delegating that responsibility to a campus judicial system and voluntarily accepts the responsibility for the decision?

3. Is it error for a district judge to hold that an affirmative defense was tried with the implied consent of the parties under F.R.Civ.P. 15(b) where the record shows that neither party was aware that the issue was in the case and where evidence introduced with regard to another issue would also be relevant to the affirmative defense?

4. Is a State's Attorney absolutely privileged to libel a student at a state college when the publication containing the libel is completely unrelated to a prosecution for a criminal offense?

5. Is a State's Attorney entitled to claim the protection of a qualified privilege when, in response to an inquiry by a college president for a laboratory analysis of a suspected explosive device, he informs the college president that in his opinion the student is mentally ill?

6. Is it reversible error for the trial court in a libel action to fail to consider the issue of malice in terms of whether the statement represented a reckless disregard for the plaintiff's rights, as well as in terms of the subjective intent of the defamer?

7. Was the court's finding that the publisher of the libel was not motivated by malice clearly erroneous?

8. Did the court err in holding that the defense of a qualified privilege was available to a State's Attorney when a libellous statement to the president of a state college concerning a student's mental capacity was not in any way connected with a prosecution for any violation of the criminal laws?

PROCEEDINGS BELOW

This is an action brought under 42 U.S.C. Sec. 1983, arising out of plaintiff's expulsion[1] from Johnson State College on February 12, 1971. The complaint, seeking damages as well as declaratory and injunctive relief, was filed on March 11, 1971. The defendants were William Craig, President of Johnson State College; Ralph Monticello, Dean of Students; and Theodore Barnet, State's Attorney for Lamoille County. The complaint alleged that acting individually and in conspiracy, the defendants deprived the plaintiff of his civil rights by expelling him without due process of law.

On January 29, 1973, plaintiff moved to amend his complaint to allege that on February 11, 1971, Barnet had libelled him in a letter to Craig. On April 11, 1973, the court took pendent jurisdiction of the libel claim.

The case was tried before the Hon. Albert Coffrin from April 11 until April 19, 1973. On September 12, 1973, the court entered its findings of fact, opinion and order denying all relief to the plaintiff. The case is here on appeal of the plaintiff.

STATEMENT OF FACTS

On December 11, 1970, at eleven o'clock p.m., the Dean of Students and the two Resident Assistants entered the room of Joel Breakstone, a student at Johnson State College, and confiscated a "device" which they found in his roommate's desk drawer. At various times this item has been described as a "bomb" or an "explosive device." In fact, it was a cardboard tube filled with approximately three ounces of rocket propellant and had been put together by Breakstone and two other students without any malicious motive. It was not fused when found, and, as was later shown, was so defectively made that it would not explode. The discovery of its existence precipitated a tragi-comic sequence of events that resulted in Breakstone's expulsion from college and his defamation by the prosecuting attorney for Lamoille County.

1. The creation and discovery of the "device."

Joel Breakstone came to Johnson State College in January, 1970. The following summer, he worked as a counsellor at a summer camp. As part of his duties, he instructed the campers in the camp's model rocketry program. At the end of the summer, one of the campers gave him several Este. Model Rocket Ship engines. These were paper covered cylinders approximately 2½ to 3½ inches in diameter containing a hard packed sparkling powder. When he returned to college in the fall, Breakstone brought these with him. The college had no regulation against such material and students regularly kept guns and ammunition in their rooms. (M. 16, 17, 38)*

One evening in early December, Breakstone and two other students were cramming for a final examination. During a respite, they brought out the rocket engines. With the assistance of the others, Breakstone removed the powder from the rocket engines and put it in a cardboard tube. Another student, David Hawkins, supplied a fuse and they decided they would blow up a snowbank. Breakstone, accompanied by David Lawrence and Jay Hoyt, took it out behind the college and tried to set it off. Despite repeated attempts, it would not detonate. Having relieved their boredom, they returned to the room, and David Lawrence put the tube in his desk. There it remained, forgotten.

On December 11, 1970, at about 8:30 p.m., David Hawkins, the boy who supplied the fuse, got drunk and told Richard Daum, a Resident Assistant, that Breakstone had a "bomb" in his room. (Exh. 2 Daum). Daum told Leonard Leene, another Resident Assistant, who discussed it with the house mother. She informed Dean Monticello. In the meanwhile, Daum and Leene visited Breakstone's room, where Daum saw something wrapped in newspaper. Daum and Leene then decided that they should talk to Hawkins again. While Daum hid in a bathroom, Leene lured Hawkins out of a party on the pretense that he had an important telephone call. (Exh. 2 Daum). Hawkins accompanied Daum to the Dean's office. At the office, the Dean, Leene and Daum questioned him about the device.

After taking Hawkins back to the party (Exh. 2 Daum), Daum and Leene considered various ploys by which they could get Breakstone out of his room. They considered and rejected a fire drill and decided instead to claim that they were looking for a missing pool cue. (Exh. 2 Daum). When that ruse proved unsuccessful, they returned with Dean Monticello and searched the room. The "device" was discovered in David Lawrence's desk and confiscated.

Breakstone was half asleep during the search and didn't fully realize what had occurred until after the search party had left. He and David Lawrence then went down to the housemother's office and demanded the return of the "device" as their joint property. The Dean demurred. Breakstone and his roommate stayed up for most of the evening discussing the incident, having realized that they were possibly in trouble. (28).

2. The events leading up to expulsion.

On December 14, 1970, Dean Monticello filed a written report of the incident with the Magistrates of the College Judicial System. Only Breakstone was charged. The magistrate advised the Dean that the civil authorities should act upon the matter and not the college court system. On the same date, Dean Monticello notified the State Police and defendant Barnet, the State's Attorney. The "device" was delivered to the authorities.

On December 15, state and federal law enforcement officers took statements from the appellant, Leene and Daum, Dean Monticello, David Hawkins and the President of the Student Council. (Exh. 2).

Leene described the search and stated that David Hawkins had told him that there had been discussion about blowing up a draft board in Schenectady, New York. He also recalled incitatory remarks that Breakstone allegedly had made in an English class, just after the Kent State tragedy. However, he admitted that he wasn't present in the class. He also thought it significant that Breakstone had friends at Goddard College.

Daum also described in detail the search and the subterfuges they employed. He had been present in the English class eight months previously and had heard Breakstone say that if the National Guard came on the Johnson campus, the students should "get snipers and shoot them at random." He also had some information to contribute concerning Breakstone's alleged use of drugs, but his statement reveals no personal knowledge.

David Hawkins stated that it was the roommate, Dave Lawrence, who said "something very facetiously about the draft board in Schenectady." He said Breakstone had asked about buying some black powder, but did not say when. He also said that he didn't know "he was involved with narcotics until this afternoon when some kids told me."

Breakstone, in his statement, described how he came by the rocket engines and how he and his roommate decided to blow up a snowbank. He also discussed his philosophy that killing was senseless. He was questioned about whether he had friends at Goddard College. He also told the police that he had not been able to obtain a fuse. At trial, he forthrightly stated that, in fact, he did get a fuse from David Hawkins, and that he lied to the police because he was scared.

These statements, along with a copy of the police investigation report, were sent to defendant Barnet. The state police also made arrangements for an examination of the device by the state laboratory and the report indicates that the results would be made available to the college authorities. (Exh. 3).

On or about December 14, 1970, Dr. Craig advised Breakstone that if the report received from the laboratory indicated the device was explosive and harmful to people and property, he would be dismissed from college. The college took its Christmas recess on December 19, 1970. Breakstone got a job during the intercession at a ski resort. He repeatedly sought information from Dean Monticello regarding his status as a student. As of January 18, 1971, when classes resumed, the laboratory report had not been received. Breakstone was permitted to return pending receipt of the lab report on condition that he could not live in the dormitory. He testified that he

gave up his job and returned on Dean Monticello's assurance that he could return "without fear of being thrown out of school." (40).

Dr. Craig then initiated a series of conversations with Breakstone. As the result of these talks, Craig formed the opinion that in building the "device," plaintiff acted without malice but with poor judgment. He believed that Breakstone's activity had created an atmosphere of tension and anxiety.

Unknown to Breakstone, during this period of time, Barnet was actively engaged in a course of conduct to secure his expulsion from school. When the device had been discovered, a state trooper reminded Barnet that Breakstone was the same person whom Barnet had prosecuted on a charge of "defective equipment" in April, 1970. Breakstone had been arrested as he drove up to a house that had just been raided for drugs. He was charged with having bald tires and put in jail overnight. The next day, Barnet represented to the judge that it was an aggravated case because it was drug related. (18).

On December 21, 1970, Barnet wrote to Craig and suggested that he "give consideration to moving the suspect to some place where his activities are less likely to cause harm and anxiety." On January 27, 1971, he notified Craig that the object had been determined to be explosive in nature. He said he had authorized the state police to do a field test to ascertain its explosive potential. In the meantime, he "earnestly recommended" that Breakstone be expelled and "that all state colleges be notified of your action." He said he would prosecute "if we can find a statute which covers this offense." Finally, he said that he had deliberately refrained from releasing news of the incident to the press, "not only to avoid possible embarrassment to the college administration, but also to avoid giving left-wing students any inspiration." (Exh. 9).

When he received the January 27 letter, Craig sought to set up an appointment with Barnet to discuss the matter, feeling that the information that was supplied was inadequate. The appointment was never consummated. Instead, Barnet ran into Craig at the Copley Hospital Auxiliary Ball. It was the first

time they had met. Barnet approached Craig and referred to the letter. (347). According to Craig, he was very agitated and irritated. (347-348). The Breakstone case was the only topic of conversation. (349). Craig told Barnet the information in the January 27 letter was insufficient. Barnet promised to "write him a letter."

The only information or assistance which Craig ever sought or desired from Barnet concerning the incident was whether or not the contents of the device would be harmful or lethal to persons or property if exploded.

On February 11, 1971, Barnet sent two letters to Craig in the same envelope. One, marked "personal" criticized Craig's handling of the case. The other contained two paragraphs. The first said that the object had been determined to be an "explosive device containing a sufficient amount of explosive matter to cause material damage to people or property when and if it would have been detonated."[2] The second paragraph stated:

> "As far as this office is concerned, the subject Breakstone is either mentally ill or possessed of such anti-social tendencies that his continued presence at a state college could constitute a risk of danger not only to state property but also to human lives as well."

The day after receiving these letters, Breakstone was advised that he was suspended indefinitely. He was given no hearing at the time of his dismissal. On February 12, 1971, his suspension was confirmed by letter.

3. The commencement of the federal litigation and appellant's reinstatement.

On March 11, 1971, Breakstone filed an action in federal district court under 42 U.S.C. Sec. 1983 seeking declaratory and injunctive relief.

On March 11, 1971, a hearing was held before the late Hon. Bernard Leddy, on plaintiff's motion for a Temporary Restraining Order to reinstate him as a student pending resolution of

the merits. Although Judge Leddy did not issue a Temporary Restraining Order, at his urging counsel for the college agreed that the matter would be referred to the college judicial system. Judge Leddy made clear that the plaintiff was entitled to written notice of the charges against him; a transcript of the proceedings; the right to put on witnesses in his behalf; the right to cross examine witnesses for the college; the right to counsel and to receive a decision in writing. (T. 12-13).

On March 19, 1971, the Breakstone case was heard by the college court, comprised of students and faculty members. Although the court found the plaintiff guilty of "manufacturing an explosive device," the court ordered that he be reinstated as a student. Subsequently, the plaintiff appealed this decision. On March 31, 1971, the College Appeals Court overruled the decision of the college court insofar as it found Breakstone guilty of manufacturing an "explosive" device. The appeals court held only that the plaintiff was guilty of "being involved in the creation of a potentially dangerous device." It ordered him to live off campus for the remainder of the semester and admonished him to obey all campus rules. It also ordered the President of the college to promulgate a policy regarding possession of "potentially dangerous devices" and urged him to afford due process in all cases of student misconduct.

On January 29, 1973, Breakstone moved to amend his complaint to allege that the February 11 letter sent by Barnet to Craig was defamatory. On April 11, 1973, the court took pendent jurisdiction of the libel claim. Barnet denied the claim but raised no affirmative defense.

After the civil rights action was filed but before the trial, Breakstone was prosecuted by Barnet in Vermont District Court for possession of fireworks. Breakstone pleaded not guilty. At the arraignment, Barnet attempted to enter a plea of not guilty by reason of insanity with the recommendation that he be committed to the Vermont State Hospital for thirty days observation. (62). This was rejected by the court. In April, 1971, Breakstone was tried, found guilty and assessed a $10.00 fine. (62).

Barnet did not prosecute the other boys involved in the creation of the device, took no steps to investigate them, and made no recommendations to Dr. Craig concerning their status as students. He testified at the federal trial that he believed that Breakstone was mentally sick and that his purpose in prosecuting him was to force him to accept psychiatric counselling. (282-283).

ARGUMENT

I. *Appellant's expulsion from college violated the Due Process clause of the Fourteenth Amendment.*

The trial court properly noted that Breakstone's reinstatement at the college after the action taken by the college judicial system has rendered moot his request for temporary and permanent injunctive relief. The court also found no credible evidence of financial loss to him as the result of his suspension. Nevertheless, the court considered Breakstone's constitutional claim that he was deprived of due process recognizing that nominal damages could be recovered. The court found the requirements of due process were met and denied relief on the further ground that Craig had a qualified immunity.

It is now an established proposition that students in state supported schools are entitled to procedural safeguards before they may be expelled or suspended for substantial periods of time. Cf. *Farrell v. Joel*, 437 F.2d 160 (2d Cir. 1971). What particular safeguards are required is determined by the circumstances. Cf. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) cert. denied sub nom. *Sostre v. Oswald*, 404 U.S. 1049 (1972).

In this case, Breakstone initially applied to the late Hon. Bernard Leddy for a Temporary Restraining Order. At the hearing, the court suggested to the college in the strongest possible terms that it give the plaintiff a hearing with full procedural safeguards. (T. 12). It is a matter of record that after a full and impartial hearing, the college judiciary reinstated Breakstone and modified the findings and sanctions. (Exh. 18).

Judge Coffrin held that a suspension for an indefinite period is sufficiently analogous to expulsion to warrant the application of procedural due process, but his view of what due process requires differed markedly from that of Judge Leddy. He held that no formal notice was required because Breakstone was well aware of the nature of the charges from his conversations with Craig and Monticello. (Op. 22). A formal hearing was unnecessary because the informal sessions with Craig explored the issue of his motivation. With respect to confrontation and cross examination the court said, "No beneficial purpose could be served by this safeguard because there was simply no significant dispute over whether plaintiff possessed this device." (Op. 23). Summing up the situation, the court said:

> "Given the concession as to the fact of the offense and plaintiff's culpability for it, the sole question before Defendant Craig as the official administering discipline was the type of punishment the offense warranted." (Op. 23-24).

This fundamentally misconceived the issue. Dr. Craig had made up his mind to suspend the appellant on December 14 or 15, *if the "device" turned out to be harmful or lethal.* The nature of the device was the crucial question. Barnet, through the facilities of the state police laboratory, was supposed to supply the answer. Barnet's letter of December 21 was rejected by Craig because it was not specific enough. The day after receiving Barnet's February 11 letter describing the device's explosive potential, Craig suspended the plaintiff. At the time he sent this letter, Barnet had not seen a lab report and was relying on information given to him over the telephone. (278). Barnet testified at trial that the report did not accurately reflect what he had been told. (277-278). Craig did not see the report until after March 16. (344). Thus, Breakstone was suspended on the basis of a laboratory analysis that none of the principals had ever seen.

The hearing which the college gave the plaintiff at the suggestion of Judge Leddy enabled counsel to cross-examine the

state police ballistic experts concerning the device. Although the transcript of that hearing is not before the court, it is a matter of record that following the hearing, plaintiff was ordered reinstated.

The importance of a hearing where the critical issue is the harmful capabilities of an "explosive device," may be seen from Dean Monticello's deposition.[3] First, he testified that he had confiscated blasting caps along with the device. (M. 18). Then, he corrected himself and testified that the caps came from some other student. (M. 19). These blasting caps were forwarded to the state police lab along with the device. Since plaintiff had not seen the lab report, he could not know that an error had been made. Obviously, if the police assumed the caps were confiscated with the device it could affect their judgment as to its explosive potential in its found condition.

Furthermore, the state police constructed a mock-up of the device which they successfully exploded. (249, 277, 279). This experiment was the basis for the conclusions stated in the March 16 report. Whether the mock-up bore any resemblance to the original or whether the means used to explode it were available to the plaintiff were crucial questions. These could only be answered through cross-examination. The complexity of the issue in this case distinguishes it from *Farrell v. Joel*, supra, and *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972).

The deficiency could not be supplied by the informal conversations that Breakstone had with Dr. Craig. According to Craig, he was interested in determining Breakstone's motivation in making the "device." The conversations were not for the purpose of enabling Breakstone to defend himself against the charges or to confront his accusers. As a matter of fact, these talks took place before all the evidence was in, so there was no way he could refute it.

The Second Circuit has twice left open the question of when a student faced with disciplinary action should be able to have the assistance of retained counsel. *Madera v. Board of Education*, 386 F. 2d 778 (2d Cir. 1967) cert. denied 390 U.S. 1028 (1968); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967). Neither of

these cases bear any factual resemblance to the case at bar. Where the critical issue involved a subject clearly beyond the competence of a college administrator, and the college was itself being advised by an attorney, full procedural safeguards are constitutionally mandated.

II. *Defendant Craig is not immune from nominal or compensatory damages.*

The court held that Craig was protected by a qualified privilege as a public officer performing his discretionary duties. The issue of immunity is governed by *Dale v. Hahn*, 440 F.2d 633 (2d Cir. 1971). In *Dale*, the court reaffirmed its language in *Birnbaum v. Trussell*, 347 F.2d 86, 88-89 (2d Cir. 1955), that a grant of immunity simply on a showing that the defendants acted within the scope of their employment and authority would effectively nullify the Civil Rights Statutes. In holding that "the defense of official immunity should be sparingly applied in suits brought under Sec. 1983," the court advanced a balancing test:

> "Thus it is apparent that there are competing considerations which must be balanced in deciding whether particular defendants are totally immune from liability and the limits of any qualified immunity."

On the facts presented in *Dale*, the court held that (1) the defendant hospital director was under no official compulsion to seek the appointment of a committee; (2) no statute precluded the safeguards which the plaintiff contended were constitutionally required; and (3) the only relief requested was compensatory damages. Under these circumstances, the court held that the lack of immunity should not seriously hamper the ability of the defendant to administer the New York Mental Hygiene Law. See also, *Ferenc v. McGuire*, 353 F.Supp. 951, 953 (E.D. Pa. 1972); 1A J. Moore, Fed. Prac. par. 0.323 (3) (2d ed. 1965).

Dr. Craig testified that when he arrived at Johnson State College, his predecessors had created a judicial system. (315). Dean Monticello had worked to implement it. (M. 5-6). Under the system, the President delegated the responsibility for dismissals of students. (328). Dr. Craig disagreed with this, feeling that the power of dismissal was non-delegable. (328).

Manifestly, Craig was under no compulsion to retain the power of dismissal for himself. His two predecessors had, in fact, delegated that power to the faculty-student court. Delegation was simply contrary to his personal philosophy. Moreover, even if he desired to reserve the final decision-making power, there was nothing to prevent him from adopting formal procedures to ensure due process of law. The campus judiciary initially declined to hear the case feeling it should properly be dealt with by the civil authorities. By December 14, Dr. Craig had decided that, in addition, administrative sanctions would be imposed if the device proved to be harmful. Dr. Craig could either have demanded that the campus court hear it, or establish a proper hearing procedure outside the campus court. In choosing to deal with the matter personally in the manner he did, he exposed himself to liability.

The district court also recognized the difficult task faced by college administrators in keeping on top of the developing body of constitutional law on campus. But the same could be said for the hospital administrator in *Dale v. Hahn*. Presumably, it was this very problem that led to the creation of the college judicial system at Johnson. It would be anomalous indeed, to permit Dr. Craig to accept voluntarily the responsibility of making the final decision on expulsion, and reject the corollary responsibility to keep abreast of developments in the area of due process.

Lastly, the court in *Dale v. Hahn* limited its decision to cases where only compensatory damages are sought. In the case at bar, the trial judge did not credit plaintiff's testimony on damages and considered Dr. Craig's liability only for nominal damages. If an award of compensatory damages could not override the policy of the Civil Rights Act, neither can an award of nominal damages.

The instant case may profitably be compared with *C. M. Clark Ins. Agency, Inc. v. Maxwell*, 479 F.2d 1223 (D.C. Cir. 1973), a civil rights action against the Insurance Commissioner of Pennsylvania.

The defendant, acting under express statutory authority, had ordered the plaintiff insurance company to suspend business. He also filed a petition for liquidation in the state court. When the court found in favor of the company, it sued the Commissioner for abuse of process. The issue was whether the Commissioner was immune.

The court adopted the approach of *Dale v. Hahn* and balanced the competing considerations.[4] The court noted that as Chief Executive Officer of the Insurance Department, the defendant was charged to execute the laws of the Commonwealth relating to insurance. The requirement that the Commissioner suspend an insurance business after making certain findings as to its solvency, was mandatory. Thus, he was called upon to exercise his discretion pursuant to lawful authority. The court found that he would be unduly inhibited from carrying out those duties by the threat of liability.

Assuming that Defendant Craig was acting within the scope of his authority, he was under no statutory compulsion to expel the plaintiff without proper safeguards. Nor, for the reasons advanced in *Dale v. Hahn*, would he be unduly inhibited from carrying out his legitimate functions if nominal damages were awarded in this case.

III. *The district court abused its discretion in holding under Rule 15(b) that the issue of privilege was tried by consent of the parties even though defendant Barnet had failed to plead it as an affirmative defense as required by Rule 8(c).*

A. Privilege is an affirmative defense or avoidance which must be pleaded.

For purposes of considering whether the issue of privilege was properly before it, the court assumed that privilege is an

affirmative defense that must be pleaded under Rule 8(c). This assumption is clearly supported by the weight of authority. The test of a truly affirmative defense is whether it raises matters beyond the scope of plaintiff's prima facie case. 2A J. Moore, Federal Practice, par. 8.27(2) (2d ed. 1972). Manifestly, it is not plaintiff's burden to plead and prove lack of privilege. Judge Coffrin himself has previously ruled in a diversity action that the defense of privilege should be affirmatively pleaded. *Drummond v. Spero*, 350 F.Supp. 844, 845 (D. Vt. 1972); *accord*, *Foltz v. Moore McCormack Lines*, 189 F.2d 537, 539 (2d Cir.) cert. denied 342 U.S. 871 (1951); *White v. Chicago B. & Q. R. R.*, 417 F.2d 941 (8th Cir. 1969); *Christopher v. American News Co.*, 171 F.2d 275 (7th Cir. 1948); 2A J. Moore, Federal Practice, par. 8.27(3) at 1851; par. 8.27(4) at 1861 (2d ed. 1972).

B. The court committed plain error in holding that the issue of privilege was tried by consent of the parties under Rule 15(b), although not pleaded as a defense.

Having assumed that Rule 8(c) required the defendant to plead the defense of privilege, the court held that "since the issue of defendant Barnet's privilege was one of the issues tried before the court, and evidence was introduced thereon without objection, the parties impliedly consented to the treatment of the privilege issue as if it had been raised in the pleadings." The record will show that the only issue tried by the parties by way of defense was the issue of prosecutorial immunity.

The proper application of Rule 15(b) has been described as follows:

> "The purpose of an amendment to conform to proof is to bring the pleadings into line with the actual issues upon which the case was tried; therefore, an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record — introduced as relevant to some other issue — which would support the amendment. This principle is sound,

> since it cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial." 3 J. Moore, Federal Practice, par. 15.13(2) at 991-992.

Thus, the actual recognition by the parties that the issue had entered the case is of paramount importance. *Systems, Inc. v. Bridge Electronics Co.*, 335 F.2d 465, 466-67 (3rd Cir. 1964); *Gallon v. Lloyd-Thomas Co.*, 264 F.2d 821 (8th Cir. 1959); *Simms v. Andrews*, 118 F.2d 803, 807 (10th Cir. 1941); 6 C. Wright and A. Miller, Fed. Prac. and Proc., par. 1493 at 462 (1971). The fact that evidence submitted would have been relevant to an additional issue not raised does not mean that the latter was tried with implied consent. *Standard Title Ins. Co. v. Roberts*, 349 F.2d 613 (8th Cir. 1965).

The second circuit cases stress that the test should be whether the defendant would be prejudiced by the implied amendment. *Lomartira v. American Automobile Ins. Co.*, 371 F.2d 550 (2d Cir. 1967); *Northern Oil Co., Inc. v. Socony Mobil Oil Co., Inc.*, 347 F.2d 81 (2d Cir. 1965). However, the question of whether prejudice arose should only be considered after it is determined that the parties are properly chargeable with notice that the issue was in the case:

> "Furthermore, when the evidence that is claimed to show that an issue was tried by consent is relevant to an issue already in the case, as well as to the one that is the subject matter of the amendment, *and there was no indication at trial that the party who introduced the evidence was seeking to raise a new issue*, the pleadings will not be deemed amended under Rule 15(b). The reasoning behind this view is sound since if evidence is introduced to support basic issues that already have been pleaded, the opposing party may not be conscious of its relevance to issues not raised by the pleadings unless that fact is specifically brought to his attention." (ital. supplied)

6 Wright and Miller, Fed. Prac. and Proc., par. 1493 at 466-467, (1971); *Otness v. United States*, 23 F.R.D. 279 (D. Ala. 1959); *Wirtz v. Savannah Bank and Trust Co. of Savannah*, 362 F.2d 857, 862 (5th Cir. 1966).

An examination of the record demonstrates that neither party ever had an inkling that privilege was an issue in the case. At the beginning of the trial Judge Coffrin ruled that he had pendent jurisdiction of the libel claim. (9). Defendant Barnet raised the defense of immunity. (9). After the trial, Barnet's counsel made oral argument (441-493) and on May 7, 1973, submitted a memorandum of law. The only issue discussed on either occasion was immunity. For the court to raise the issue of privilege for the defendant in its opinion when the record is barren of evidence that the issue was voluntarily litigated, violates the essentials of due process and fair play. *Armstrong Cork Company v. Lyons*, 366 F.2d 206, 208 (8th Cir. 1966); *Sylvan Beach v. Koch*, 140 F.2d 852, 861-62 (8th Cir. 1944)

In any event, plaintiff was prejudiced by the amendment. Prejudice exists if the party is denied a fair opportunity to defend or if he is deprived of the opportunity to offer evidence which he would submit if the case were to be retried on a different theory. *Lomartira*, supra, 371 F.2d at 552.

Where the plaintiff knows that privilege has been claimed, his trial strategy will be designed to establish that the occasion was abused. The court did not even address itself to this question. If the court felt compelled to raise a defense which the defendant overlooked, it was equally obligated to scrutinize the record to see if the privileged occasion was abused. Furthermore, the court might have reached a different result if plaintiff had had the opportunity to brief the issue. Unless this court finds an error of law, plaintiff's burden on appeal is to show that the finding of fact on privilege was clearly erroneous. This puts him at a substantial disadvantage.

A fundamental aspect of the plaintiff's case was the asserted conspiracy between Barnet and Craig. The whole thrust of the cross-examination was to establish the close interaction be-

tween these two individuals. Having spent a good deal of the trial attempting to show their affinity, it is now in plaintiff's interest to demonstrate from the record their divergent interests.

Finally, the legal issues presented by the defense of prosecutorial immunity differ markedly from those of privilege. Plaintiff believed that Barnet's own testimony defeated his claim to immunity. If plaintiff had known that the ratio decidendi would be privilege, he would have called additional witnesses. Among these would have been Lt. Killay from the state police lab to explain the discrepancy between the lab report and what he was alleged to have told Barnet; and Dean Monticello, to resolve the contradiction between his deposition and Barnet's testimony concerning whether the campus was in a state of anxiety. (compare M.32 with 218).

IV. *The district court erred in holding that Barnet was absolutely privileged to libel the appellant.*

The line between the absolute *immunity* of a public officer to be free from tort liability and the asserted absolute *privilege* in the context of a libel action is exceedingly fine. The primary consideration under both theories is whether to subject the officer to suit would unduly hamper his ability to fearlessly carry out his duties. III Restatement of Torts, sec. 585 (1938).

Finding no relevant Vermont caselaw, the court applied the "outer perimeter" test of *Barr v. Mateo* 360 U.S. 564 (1959), and held Barnet immune. In fact, the Vermont Supreme Court had addressed itself to the question of absolute immunity for prosecutors in *Polidor v. Mahady*, 130 Vt. 173, 287 A.2d 841 (1972), and held that it does not extend beyond judicial acts. In *Polidor*, the plaintiff sued a state's attorney for alleged deficiencies in criminal process he had initiated. The court observed that "The factual allegations display no straying from official function as to put the action of the prosecutor outside the protection of his judicial role." It made the law of immunity developed under the Civil Rights Act a part of Vermont law:

"Although Rev. Stat. sec. 1979 (1875), 42 U.S.C. sec. 1983, as part of the laws of the United States, has increased the

concern of the Federal courts with prosecutorial actions, they have still retained the concept of judicial immunity, and applied it to prosecutors where appropriate. *Robichaud v. Ronan*, 351 F.2d 533, 536 (9th Cir. 1965). As that case points out, the protection from civil liability extends only to acts of the prosecutor properly denominated judicial or quasijudicial. Thus, this judicial immunity is not limitless, since it does not protect judicial officers acting clearly beyond the reach of their office and jurisdiction. Acts which are only in excess of jurisdiction, such as those ordinarily justifying a dismissal of a criminal complaint on challenge by proper motion, are not, without more, 'clearly outside' the jurisdiction of a prosecutor, and even under Federal law the officer is not thereby exposed to liability. *Bauers v. Heisel*, 361 F.2d 581, 590-91 (3d Cir. 1966). These principles equaliy justify the dismissal of this civil suit."

The duties of state's attorneys are set forth in 24 V.S.A. sec. 361, as amended. These duties are chiefly to prosecute for offenses committed within the county and to file informations and prepare bills of indictment. When performing these duties, he is immune from civil liability. *Zera v. Tepper*, 358 F.Supp. 963 (D. Vt. 1972).

The trial court held, however, that any actions taken by the State's Attorney to anticipate potentially dangerous situations, whether or not directly involved with a criminal prosecution, are within the purview of his duties. In support of this proposition, it cited an Attorney General's opinion that "the duties and responsibilities of the State's Attorneys are not limited to only criminal matters referred to in the statute." But that opinion was simply a ruling that State's Attorneys may draft petitions for commitment of dependent and delinquent juveniles under a statute providing that "a person who has knowledge" of such a child should do so. Since it involved an issue of statutory construction, dealt with the initiation of judicial proceedings, and involved a potential conflict in the State's Attorneys' duties, its scope is narrow.

The court's expansive reading of the scope of state's attorneys' powers would undercut the Vermont Supreme Court's decision in *Polidor*. By citing *Robichaud v. Ronan*, the court gave explicit recognition to its rationale that the immunity doctrine does not shield state's attorneys when engaged in "investigation." See, *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972) cert. denied 94 S.Ct. 894 (1974). Barnet, himself, believed that he was acting in an investigative capacity. (192).

It is apparent that the libellous statement made by Barnet in his February 11 letter was beyond the pale of his judicial or quasi-judicial duties. This is reflected in the trial court's finding that,

> "They had no direct connection with any judicial proceeding pending or subsequently to be brought. In this connection, we conclude that defendant Barnet's subsequent prosecution of the plaintiff for violation of the fireworks statute was in no way related or connected with the statements which he wrote to defendant Craig." (Op. 31).

The rule of absolute privilege promulgated by the district court would grant state's attorneys a roving commission to ferret out what they deemed to constitute potential threats to the common weal and then deal with them by extra-judicial remedies. Such doctrine has no precedent in the law of absolute immunity or absolute privilege. See Gatley, Libel and Slander, pp. 186 et seq. (3rd ed. 1938); III Restatement of Torts, sec. 585 (1938).

V. *Defendant Barnet was not protected by a conditional privilege with respect to the libellous statement.*

A. Introduction.

A privileged occasion is an occasion where the person who makes a communication has an interest, or a legal, social or moral duty, to make it to the person to whom it is made, and

the person to whom it is so made has a corresponding interest or duty to receive it. Gatley, Libel and Slander, 219 (3rd ed. 1938). If the publisher can succeed in showing that the occasion was privileged with respect to the defamatory matter, there can be no liability absent a showing of malice. This is subject to the caveat that the privilege may be defeated if the publisher abuses the occasion.

The trial court held that Barnet's statement was conditionally privileged because he and Craig had a mutual interest in Breakstone's status and activities on campus, and that it was made for the purposes of public safety and to protect state property. (Op. 35). However, the existence of the privilege must be determined with regard to the particular defamatory publication.

A prefatory remark regarding the standard of review and the burden of proof is in order. Ordinarily, the question of whether the occasion is privileged is for the judge, the burden of proof being on the defendant. Once the occasion is held to be privileged, the question whether it was abused by the defendant is for the jury with the burden of proof on the plaintiff. 1 F. Harper and F. James, The Law of Torts, 437 (1956).

The confusion created by this division of functions has been described as follows:

> "The problem may be posited whether the occasion is privileged as to the particular defamatory publication, which presents it as a question solely for the judge with the burden of proof on the defendant. On the other hand, the problem may be formulated whether the defendant abused an occasion upon which he was privileged to communicate some defamatory matter by the publication of unnecessary and irrelevant defamatory matter, in which case the burden of proof is on the plaintiff. The problem is of practical importance mostly by reason of the question of burden of proof. Aside from this aspect of the situation, it is immaterial whether the occasion is privileged for the publication of the particular communication actually made or whether, the occasion being privileged, the defendant's language constitutes a proper use and not an abuse thereof."

1 Harper and James, supra, 437-38.

The difference is significant in this case because if the question of privilege is a question of law, the scope of review is broader than if viewed as a factual question.

It is also important to recognize that the question of whether a privilege is defeated by its being abused is distinct from the question of whether the statement was made with malice. W. Prosser, Torts 819, 821 (1964). The English cases, which tended to obscure the distinction, have been properly criticized. Harper and James, supra, at 438.

B. Defendant Barnet's libellous characterization was not privileged because Craig lacked a common interest in the information and because the information volunteered by Barnet went beyond Craig's request.

The conditional privilege attaches to "statements made on a *subject matter* in which both the defendant and the person to whom the statements are made have a legitimate common interest." Gatley, Libel and Slander 214 (3rd ed. 1938). (emphasis supplied). The issue then is whether Barnet and Craig had a common interest in the state of Breakstone's mental health.

The English cases hold that the reciprocal interest must actually exist to create the privilege. An honest and reasonable belief on the part of the defendant that another shares his interest is insufficient if, in fact, he had none. Gatley, Libel and Slander, supra, 259-60; 269-70; 271-72. The Restatement is contra. III Restatement, Torts, sec. 594 (1938). American authority on the problem is meager. Harper and James, supra, at 440 n.6. There is no Vermont case in point.

The English rule has been criticized on the ground that privilege is of little value if it depends upon the existence of facts that are unknown and unknowable to the defendant. 1 Harper and James, supra, par. 5.25 at 438-39. Self-defense and defense of property are used by Harper and James to support their

thesis that in other areas of tort law, privilege almost invariably depends upon the facts as they reasonably appear to the person whose liability is in question. But the validity of these analogies is doubtful. The defamer is uniquely in a position to ask his correspondent whether he is interested in information that he would like to impart. The Restatement rule also creates formidable problems of proof. 1 Harper and James, supra, at 441.

Barnet's views on plaintiff's mental health were unsolicited by Craig and were not considered by him in making his decision. (378-79). All Barnet had to do was pick up the phone and ask Craig if he would be interested in hearing his opinion regarding Breakstone's sanity. Craig's interest in the matter was neither unknown nor unknowable.

The English rule is premised on the notion that a reasonable belief that the other party had a corresponding interest in certain information may be relevant on the issue of malice, but it cannot be used to create a privilege. Gatley, supra, at 269-70. At least in the area of conditional privilege, this is the better rule. In the absence of a decision by the Vermont Supreme Court, this court should adopt it as the one Vermont would most likely follow.

The defense of privilege is also unavailable to Barnet because his defamatory characterization of Breakstone was unsolicited. It is of no consequence that Barnet's letter was in response to an inquiry by Dr. Craig. The latter requested Barnet to supply him with technical information from the police laboratory concerning the capabilities of the device, and nothing else.

> "A person may not, in answer to an inquiry on a privileged occasion, 'travel into matters' wholly unconnected with, and irrelevant to, the subject matter of the inquiry. If his answer extends to matters outside those in which he and the person making the inquiry have a common interest, no privilege will attach to it *as regard such matters*. (emphasis supplied)

Similarly, if A asks B a question about C, and B in reply un-

necessarily includes matters defamatory of C, no privilege would attach to such defamatory matter. It would be going a long way to say that any document could be excused upon the ground of privilege, if it referred to matters to which there was no necessity to refer at all."
Gatley, supra, at 235-36.

C. *Even if the occasion was privileged, the privilege was defeated because Barnet abused it.*

It is a requirement of all qualified privileges that they must be exercised in a reasonable manner and for a proper purpose. III Restatement, Torts sec. 599 et seq. (1938). The immunity is forfeited if the defendant steps outside the scope of the privilege, or abuses the occasion. He will be liable if he publishes the statement to accomplish a distinct objective, which may be legitimate enough in itself, but is not within the privilege. W. Prosser, The Law of Torts, 822 (1964).

Barnet articulated two reasons for including the defamatory material in his letter: "treatment and segregation." (302; 290). He was convinced that Breakstone ". . .had this hate in him, and someone should help him get it out," (291) and that "someone had to take the responsibility of trying to deal with the problem." (291). He pursued the same theme with Ms. Villa, the attorney who represented Breakstone at the prosecution for possession of firecrackers. (291, 293). Thus, a major motivation, by Barnet's own admission, was to force the plaintiff to obtain psychiatric help. This ulterior motivation was plainly beyond the privilege and extinguishes it.

Abuse of the privilege may also occur when a person, upon a conditionally privileged occasion, although honestly believing the defamatory matter to be true, has no reasonable grounds for so believing. III Restatement of Torts, sec. 601; sec. 594 at 243 (1938).

"The negligence of the publisher in making unqualified statements of fact without knowledge of circumstances which would lead a reasonable man to believe them to be

true, is an abuse of the occasion."

III Restatement of Torts sec. 602 at 265.

The factors that led Barnet to diagnose Breakstone's mental illness are found in the transcript, pp. 279-82.

(1) The information he had at his disposal indicated to him that the plaintiff was involved and had been a user or was presently a user of drugs.

(2) Plaintiff had expressed sentiments which could be "characterized as seditious, advocating violent overthrow of the government, and advocating unrestrained use of violence in connection with student political demonstrations and disorders on college campuses."

(3) The plaintiff had manufactured an explosive device which was established to be dangerous to life and property and had requested information as to how he could obtain dynamite.

(4) He had threatened the physical welfare of several students on campus in connection with investigations surrounding the making of the bomb, two of whom were in fear of their lives and sought out the State's Attorney for protection.

Although Barnet stated that the function of his office was to act as a screen between the individual and the police, he violated that principle in letter and in spirit.

Barnet did not have one shred of evidence that Joel Breakstone was involved with drugs. He stated his view that if someone associates with others known to be involved in drugs, it is likely that he is a drug user. (224-25). He considered Breakstone to be one of these because he had been arrested driving up to a house on the night of a drug bust.

Richard Daum, in his statement to the police, claimed that Breakstone used drugs. However, he never saw him take drugs. He related two instances when Breakstone said he was "tripping" but Daum admitted "he didn't seem all that strange really . . ." When asked who he bought drugs from, the best he could offer was hearsay. There is no indication through how many people the story had passed before reaching Daum's ears.

David Hawkins, when asked by the police where Breakstone got his narcotics, replied, "I didn't even know he was involved

with narcotics until this afternoon when some kids told me." (Exh. 2 Hawkins). Also, Barnet knew Hawkins had a reputation as a story teller. Barnet has never revealed any other source for his belief that the plaintiff was a user of narcotics.

Barnet's reliance on plaintiff's asserted "seditious" utterances is remarkable not only because of the intervening span of time but also because it reveals his shocking indifference to the First Amendment. The statements on which Barnet relied were made in English class in the spring of 1970, just after Kent State. By Breakstone's account, he said that *if fired upon* dissidents and demonstrators should be *prepared to return fire* and protect lives. Leonard Leene said Breakstone was in favor of shooting people at random wherever they may be, but he admitted that he was not in the English class and did not hear him. Richard Daum, who was in the class, remembered Breakstone saying that "*if National Guard (sic) came on campus*, the best thing we could do is get snipers and shoot them at random and just shoot people to provoke violence. . ." Whichever version was accurate, it was clearly protected speech. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The National Guard was not on campus and however irritating it may have been to other members of the class, Breakstone had a right to say it. There was never any evidence that Breakstone was a political activist or that his classroom statement was anything more than an outburst caused by a frustration that many students felt at the time.[5]

Nor did the mere fact that Breakstone had constructed the "device" justify the extreme characterization that Barnet used. There was never any reason to disbelieve his story that he and his friends constructed it to blow up a snowbank. And, as has previously been pointed out, Barnet never considered for a moment that the other three students presented a danger to the school although they were equally culpable for putting it together.

Furthermore, "explosive devices" were not strangers to the Johnson campus. As Dean Monticello stated in his deposition, students regularly kept guns in their rooms despite a college

policy against it. (M. 16). And there was no regulation at all proscribing ammunition (M. 17).

Barnet also referred to testimony that Breakstone had requested advice on where he could obtain dynamite. David Hawkins and Breakstone had been interested in buying some black powder but as far as dynamite was concerned, David said "He said something about dynamite and going to New Hampshire and that's about it." (Exh. 2 Hawkins). He was not asked when the alleged conversation had taken place, although Barnet inferred it was late November because there was a reference to snow being on the ground. (237-240).[6]

Another factor was the "creepy fear" that Breakstone inspired in people.[7]

Finally, Barnet claimed that Breakstone had threatened the physical welfare of "several students" in connection with the discovery of the device and that two of them went to his home in a highly emotional state. (236). The two who visited Barnet were Leene and Daum who were, of course, deeply involved in the whole affair. Daum's description of their antics surrounding the discovery of the device (e.g., the subterfuge they employed to question David Hawkins, the "pool cue" ruse they thought up to get into Breakstone's room) should have tipped anyone off that they had an overactive sense of the dramatic. Again, Barnet accepted their word without once offering Breakstone the opportunity to rebut it.

That this concatenation of unsubstantiated stories, hearsay, protected association and protected speech could give Barnet reasonable belief that Breakstone was mentally ill is preposterous. Even assuming that all this information were true, it would not justify the extreme characterization of the plaintiff as mentally ill. Under these circumstances, there can be no privilege.

D. Assuming the occasion was privileged, and that the privilege was not abused, the court failed to apply the proper standard to determine whether Barnet acted with malice.

The court's entire discussion of whether Barnet acted with

malice was directed to his subjective intent.[8] But the malice required to be demonstrated in order to defeat a qualified privilege need not be ill will or spitefulness. Actual malice may also be inferred from a statement made with "reckless and wanton disregard of the plaintiff's rights." *Lancour v. Herald and Globe Ass'n.*, 112 Vt. 471, 482, 28 A.2d 396, 403 (1942); *Sparrow, Adm'r. v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921); *Michlin v. Roberts*, (Vt. Sup. Ct. #12-73, Oct. Term 1973) p.8.

Defendant Barnet is the elected State's Attorney for Lamoille County. He is a graduate of the Columbia Law School and holds a Master's degree in law from New York University Law School. Because of the awful power of his office, he has an added responsibility to those he is called upon to prosecute to "do equal rights and justice to all men." Vermont Constitution Ch. II sec. 52. (Oath of Office). Ignorance of the law cannot excuse him: he is presumed to know it. Cf. *In re Wakefield*, 107 Vt. 180, 185-86, 177 A. 319, 321-22 (1935); *Whirl v. Kern*, 407 F.2d 781, 791 (5th Cir. 1968) cert. denied 396 U.S. 901 (1969).

It is simply too much to believe that Barnet did not know that there is a law of defamation, the purpose of which is to protect people against libellous statements made without basis in truth. Yet, he wrote a letter to the President of a state college giving the opinion of "his office" that plaintiff was mentally ill, knowing full well that he did not possess one scintilla of evidence to justify such an allegation. Barnet's communication to Craig displayed an unbelievable insensitivity to the ramifications of that charge to the plaintiff.

The court's failure to employ the proper standard and to consider Barnet's action in light of his education and position is reversible error.

E. The court's finding that appellant did not sustain his burden of proving malice was clearly erroneous.

A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has

been committed. *Romero v. Garcia & Diaz, Inc.*, 286 F.2d 347 (2d Cir.) cert. denied 365 U.S. 869 (1961). The evidence of malice appearing in the record is overwhelming.

> "Actual malice does not necessarily mean personal spite or ill-will. 'Malice in the actual sense may exist even though there be no spite or desire for vengeance in the ordinary sense.' 'Any *indirect motive* other than a sense of duty is what the law calls malice.' 'Malice means making use of the occasion for some *indirect purpose*.' 'If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion not for the reason which makes the occasion privileged, but for *an indirect or wrong motive*' — *'an improper motive'* — *'some motive other than that which alone would excuse him'* — *'some indirect motive not connected with the privilege.'*
> Gatley, Libel and Slander, 635 (3rd ed. 1938).

Barnet admitted that he wrote the letter with two things in mind — segregation and treatment. He admitted that nowhere in his letter did he suggest to Dr. Craig that psychiatric counselling be afforded the plaintiff. (301-302). He expected Dr. Craig to infer this. He was thus attempting to use the privilege to achieve an unrelated goal.

By his own admission, he used the threat of a criminal prosecution to achieve the same end. (282-283). And when Ms. Villa would not agree to psychiatric counselling, Barnet attempted to have Breakstone committed to the State Hospital by entering a plea of not guilty by reason of insanity to the charge of possession of firecrackers.[9]

Furthermore, an important element in the consideration of malice is whether the language used was grossly disproportionate to the occasion. *Shurtleff v. Stevens*, 51 Vt. 501, 518 (1879); *Washington Annapolis Hotel Co. v. Riddle*, 171 F.2d 732, 736 (D.C. Cir. 1948); *Marsh v. Comm. and Savings Bank of Win-*

chester, Va., 265 F.Supp. 614 (W.D.Va. 1967); *People's Life Ins. Co. of Washington, D.C. v. Talley*, 166 Va. 464, 186 S.E. 42, 44 (1936); Gatley, Libel and Slander, 637 (3rd ed. 1938). Despite the overwhelming importance of the language used as a factor in determining malice, the court doesn't mention it.

Extravagant language alone is not conclusive evidence of malice. However, an abundance of evidence points in the same direction.

The testimony at trial disclosed a pattern of intentional persecution of the plaintiff because Barnet was convinced that he was involved in the "drug culture."

There was some evidence that Barnet had first met Breakstone at a teach-in at Johnson State College following the Kent State tragedy. Barnet, in his words, was representing "the establishment" and recalled that the discussion was volatile. However, he could not remember seeing Breakstone there.

There is no question that they met when the defendant prosecuted Breakstone on a charge of defective equipment following a drug raid on a house in Johnson. Breakstone had been arrested as he drove up to the house. He was not charged with any offense relating to drugs but instead was arrested and jailed for operating a car with bald tires. When it was disclosed in court that Breakstone had been jailed overnight, the defendant told the judge that it was an aggravated offense because it was drug related.

Although there was no evidence to connect Breakstone with drugs, this was the light in which Barnet saw him. (220-221, 224-225). When the cardboard container and powder was discovered in Breakstone's room on December 11, a state trooper reminded Barnet that he was the one who had been arrested driving up to the farmhouse. (220). Barnet testified at trial that he was convinced that Breakstone was sick and needed help (274, 291, 293) and that the reason he prosecuted him was to force him to seek help. (282-83). Thus, even while Breakstone was represented by counsel, Barnet attempted to plead him not guilty by reason of insanity. This was not because he had one shred of evidence indicating that Breakstone was insane or in-

competent to stand trial, but rather he saw it as a means to "help" him which was beyond his power as a prosecutor.

From the time the device was brought to his attention, he had pressured Dr. Craig for expulsion. On January 27, he told Craig that he had deliberately refrained from releasing a story to the newspapers so as not to embarrass the college administration. (259). He admitted that this could be construed as a threat. (264). He also said he wanted to avoid giving any inspiration to left-wing students, but he admitted that he was unaware of any problem with left-wing students in Vermont. (264).

Barnet approached Dr. Craig at a hospital ball and the only topic of conversation was the Breakstone case. (349). He was "very agitated" (347) and "irritated" (348). He promised to send Craig a letter giving him the information he needed.

The description of the device he gave Dr. Craig in his February 11 letter did not reflect the contents of the lab report which finally materialized on March 16. (277-78).

Finally, Barnet has never explained why, if his concern was the safety of persons and property at the college, he took no steps to investigate the other three students who participated in the construction of the device. From the police reports, he knew that Jay Hoyt, Dave Lawrence and Dave Hawkins all had a part in making it. (171, 208, 211). It was Dave Lawrence, and not Breakstone, who had packed the rocket propellant in with a broomstick (208) and who had made a facetious remark about blowing up a draftboard in Schenectady. (235, 241-42). And it was David Hawkins who had access to black powder and fuses (210) and, to judge from the state police reports, had an unstable personality. Yet, inexplicably, Barnet never corresponded with Craig about them and initiated no prosecution against them. (288). This leads inexorably to the conclusion that Barnet's sole interest was to drive Breakstone, whom he regarded as a left-wing student and drug user, from the campus (and, indeed, from all state colleges). This selective persecution negates the claim of good faith.

VI. *Defendant Barnet is not conditionally immune from liability by virtue of his office as State's Attorney.*

The trial court did not address the question of whether Barnet was protected from liability by the doctrine of prosecutorial immunity, preferring to rely on the doctrine of privilege. The court assumed without deciding that Barnet could not claim the protection of prosecutorial immunity. (Op. 30).

In Section IV of this brief, plaintiff has set forth the reasons why Barnet is not entitled to absolute immunity, either under the privilege doctrine or by virtue of his office. Whether he can claim a prosecutor's qualified immunity is governed by entirely different principles.

When a prosecutor is engaged in proper investigative duties, he may assert the same defense as that given policemen — a defense of good faith and probable cause. *Littleton v. Berbling*, supra; *Robichaud v. Ronan*, supra.

The doctrine was given sanction by the Supreme Court in *Pierson v. Ray*, 386 U.S. 547 (1967), where policemen were sued for effecting arrests under a statute subsequently held to be unconstitutional. But the doctrine has been limited and it is now clear that the defense is unavailable where a policeman acts unlawfully or where the pressures on an official do not require split second judgment. *Whirl v. Kern*, 407 F.2d 781, 789-92 (5th Cir. 1968), cert. denied 396 U.S. 901 (1969); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *Sexton v. Gibbs*, 327 F.Supp. 134, 141-42 (N.D. Tex. 1970), aff'd. 446 F.2d 904 (5th Cir. 1971), cert. denied 404 U.S. 1062 (1972).

A. *Defendant Barnet cannot claim a defense of good faith and probable cause because he was not engaged in investigative duties when he libelled the appellant.*

An investigation presupposes the bringing of a criminal prosecution and is directed to that end. That is why, in appropriate

cases, the prosecutor may assert the policeman's defense. But a prosecutor may venture into areas which are totally unconnected with his statutory duties.

Barnet admitted that he had no authority over the college. (285). His intrusion into the internal affairs of the college to force the plaintiff to obtain psychiatric help and to obtain his "segregation" was unrelated to his investigation for the purpose of bringing criminal charges. The court so held (Op. 31). When he wrote the letter, Barnet was not involved in judicial, quasi-judicial or even investigative functions.

B. Assuming Barnet can assert the defenses of good faith and probable cause, he failed to sustain his burden.

The cases make clear that to establish the defense, the defendant must prove *both* that he acted with probable cause and in good faith. *Sexton v. Gibbs*, supra.

A policeman's defense of good faith is designed to shield him if he makes an arrest which later proves illegal. By parity of reasoning, a prosecutor's defense of good faith goes to the question of whether his investigation was carried out in good faith of securing a conviction. Barnet's lack of good faith has been amply documented.

Nor did he have probable cause to seek "segregation and treatment" for the appellant. Recently, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972), the court held that the probable cause standard for federal police officers has two elements — the first subjective and the second objective. "Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable."

It is not self-evident that the same standard should apply to prosecuting attorneys. Barnet was not under the same pressure to act as were the narcotics agents in *Bivens*. Assuming the "reasonable belief" standard, however, Barnet's defamation of the appellant, in light of his training and the unreliability of the information he had concerning the plaintiff, was unreasonable under both the objective and subjective tests.

VII. DAMAGES

A. Damages against Defendant Craig.

An action for damages for deprivation for civil rights sounds in tort, and will support a judgment for nominal, actual and punitive damages. *Hague v. C.I.O.*, 101 F.2d 774 (3rd Cir.) mod. on other grounds, 307 U.S. 496 (1939). The court chose not to credit plaintiff's testimony on actual damages and did not award nominal damages on its alternative findings that there was no constitutional violation and that the defendant was immune. If the court should find that plaintiff was not accorded the requisites of due process as required by the facts of this case, and that the defendant was not immune, it should remand to the district court for entry of nominal damages.

With respect to one element of compensatory damages the court committed reversible error. Plaintiff testified that he had a work-study job on campus after he returned from Christmas vacation. (42-43). He earned $1.60 an hour and worked about fifteen hours a week. (43). Dr. Craig testified that when Breakstone was suspended, his employment terminated. (353-354). In the pretrial order, the plaintiff claimed $150 lost income. The defendants did not dispute this sum. These damages were established and should be awarded to the plaintiff if he prevails on appeal.

B. Damages against defendant Barnet.

The court held that Barnet's characterization of plaintiff as mentally ill was actionable *per se*. For the reasons stated in plaintiff's brief, Barnet was protected neither by prosecutorial immunity or privilege. The plaintiff is entitled to nominal damages.

Should plaintiff prevail, the case should be returned to the district court for consideration of punitive damages. The evidence disclosed that Barnet was convinced that Breakstone was mixed up with drugs although he could not prove it. He thought "his world view was twisted in some way or other." (283). He also thought the only applicable law — the fireworks statute —

was inadequate to deal with Breakstone's offense. (256, 257-258). He thus embarked, under color of his office, on a deliberate campaign to have Breakstone expelled from college, and prosecuted him with the intention of forcing him to accept psychiatric treatment. He thus arrogated to himself powers which were beyond his office. In effect, he engaged in the adjudication of legal rights in contravention of state law. *Gould v. Parker*, 114 Vt. 186, 188-89, 42 A.2d 416, 418 (1945).

In all his endeavors Barnet was cloaked with the authority of a state's attorney. He showed shocking indifference to his own principle that the state's attorney should act as a shield between the individual and the police. He was bent on persecution of an individual as shown by the letters he wrote and his conduct at the subsequent trial for possession of fireworks as related by Ms. Villa. On these facts an award of punitive damages, attorney's fees and costs of litigation would be appropriate.

CONCLUSION

For the reasons set forth above, the plaintiff appellant respectfully submits that the judgment of the court below should be reversed.

Respectfully submitted for the plaintiff.

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FOOTNOTES

1. Technically, plaintiff was suspended for an indeterminate period. The district court ruled that this was sufficiently analogous to an expulsion to mandate the application of due process.

* Numbers without letters in parentheses indicate pages in transcript; "M" designates Monticello deposition; "T" designates Hearing on Temporary Restraining Order; "Op." designates the opinion of the district court.

2. This information was not based on the lab report, which was not issued until March 16. Rather, it was based on information allegedly given to Barnet over the telephone by the police lab. In fact, there were discrepancies between Barnet's statement and the lab report.

3. Dean Monticello did not appear at the trial and by agreement his deposition, with corrections, was introduced in evidence. (432-439).

4. *C. M. Clark Ins. Agency, Inc. v. Maxwell*, supra, 479 F.2d at 1227.

5. Significantly, Barnet testified that he associated the classroom statements with input he had received about blowing up draftboards. (241-42). But it was David Lawrence, not Breakstone who had made a facetious remark about blowing up a draftboard. (235, 241-42).

6. As anyone who lives in Vermont knows, there is generally snow on the ground from October till May.

7. "Then there was in addition the creepy fear that many people were experiencing from him. He had been described by several people, to me, as 'weird.' Now, this, in itself, all by itself, isn't something one can hang one's hat on and say he was mentally ill, but this was one more thing I was made aware of, . . ." (280-281).

8. ". . .We are convinced that his statement reflected his honest belief as to the reasons which motivated plaintiff to construct and attempt to detonate an explosive device;" "We believe Barnet to be a conscientious and dedicated public servant;" "If anything, he was excessively zealous in seeking to fulfill the obligations to society imposed by his office as he believes them to be;" ". . .we cannot fault him for endeavoring to carry out the functions required of a State's Attorney in the manner he felt indicated in light of the events as he understood them;" "The actions which he undertook were done in the faithful discharge of his duties as a public officer;" "Barnet bore no particular ill will toward plaintiff but rather was legitimately concerned by the nature of the conduct exhibited by plaintiff." (Op. 35-36).

9. Ordinarily, evidence of a subsequent libel which is itself made on a privileged occasion, is not admissible to show malice. *Shinglemeyer v. Wright*, 124 Mich. 230, 82 N.W. 887 (1900). But the testimony concerning Barnet's actions at the firecracker trial was not objected to by the defendants.

ADDENDUM

On page 18, appellant states that at the beginning of the trial, the court took pendent jurisdiction of the libel claim and "Defendant Barnet raised the defense of immunity." The record shows that Mr. Cleary also said he wished to raise the "ground of trust as a defense." (9) If by this he intended to raise the defense of *privilege*. his meaning was lost on the plaintiff as well as the judge, who was to rule subsequently that the affirmative defense was not pleaded.

As pointed out in the text, defendant's failure to mention privilege (or trust) in his closing argument or in his memorandum of law, supports plaintiff's contention that at no time was he put on notice that a defense of privilege was being raised.

This case is distinguishable from *Bucky v. Sebo*, 208 F.2d 304 (2d Cir. 1953), a patent infringement case. The complaint did not mention infringement-estoppel or unfair competition. The pre-trial order specified validity-estoppel but not the other two issues. The court held that infringement-estoppel could properly be considered by the court because it had been *expressly* referred to by plaintiff's counsel during the trial, without objection.

With respect to the "unfair competiton" theory, which was not mentioned at trial, the court said, "we would be disposed to hold that the trial judge or we could consider it, subject to the right of the defendants to ask an opportunity to present further evidence to the trial court on that issue." *Bucky v. Sebo*, supra, 208 F.2d at 306-307. This was apparently dictum. In any event, such an option would not avail plaintiff in the case at bar since his whole trial strategy was devised without that issue in mind. See discussion in text, p. 18-19 supra.

aclu American Civil Liberties Union of Vermont

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March 22, 1974

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York 10007

Re: Breakstone v. Johnson State College, et al.
Docket No. 74-1100

Dear Mr. Fusaro:

Please be advised that on this date I posted under separate cover in the United States mail twenty-five copies of Appellant's brief and ten copies of the Appendix. Thank you.

Very truly yours,

Richard S. Kohn

Richard S. Kohn